# No. 14,750

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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PHYLLIS BAEKGAARD, formerly Phyllis Irene Carreiro,

*Appellant,*

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK & UNION TRUST COMPANY,

*Appellees.*

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## APPELLANT'S REPLY BRIEF.

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## APPELLANT'S REPLY BRIEF.

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### STATEMENT OF THE CASE.

Little need be added on this subject to what was said in our opening brief.

(1) It is true that George Carreiro did not sign a change of beneficiary form. It is *not* true that the insurance company requested him to sign such a form. There was no such request. There was only a statement in the company's letter of September 6, 1951, to the effect that forms would be prepared for his

signature if he wished to change the beneficiaries of his policies.

His failure to sign such forms would be significant if, under the law of California, he was required to sign them in order to remove Genee Carreiro as a beneficiary. His failure to sign them is of no significance, however, if he was not required to sign them (and it is our contention that he was not) in order to remove her as a beneficiary.

(2) It is true that Genee Carreiro was named executrix and residuary legatee in George Carreiro's will and that he did not destroy that will after the execution of the property settlement agreement even though he destroyed his father's will. It is *not* true that, when his will was probated, recognition was given to Genee Carreiro's claims as executrix and residuary legatee.

We would normally consider it improper to bring up the subject of what happened in the probate proceedings since those proceedings are not part of the record in this case. In view of the misleading statements contained in the brief for appellees, however, we have no choice but to submit the following:

The will of George Carreiro was indeed originally offered for probate by Genee Carreiro who, at the same time, petitioned to be appointed as its executrix. Objections to her appointment were filed by Irene Carreiro, however, on the ground that, under the terms of the property settlement agreement, Genee had waived her right to be executrix. After a contested hearing, Genee's petition was denied and Irene

was appointed administratrix with the will annexed. Subsequently, Irene's appointment was revoked and Wells Fargo Bank was appointed executor.

All of the foregoing took place several months before the trial of this case. So far, there has been no determination as to who is entitled to take under the will.

It is not our purpose to argue that the ruling of the probate court (which has long since become final) denying Genee the right to be executrix should be conclusive in this case as to her claim to the proceeds of the policies. Our purpose is only to set the facts straight and to state fairly what has taken place so far in the Superior Court of the State of California, in and for the City and County of San Francisco, in the course of the proceedings (numbered 130295) for the probate of George Carreiro's will.

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## ARGUMENT.

It is not clear to us why appellees accuse us of being "strangely silent" (page 8 of their brief) about the procedure adopted by the trial judge in invoking so-called principles of equity and dividing the proceeds in four equal shares. We would have thought that we talked about nothing else in our opening brief.

Interestingly enough appellees declare that such a procedure "does have precedent" (page 8) and then proceed to cite none.

Be that as it may, however, we recognize that, even though the trial judge had no power to do what he did, we are in a position to complain about it only if appellant was prejudiced thereby.

She was prejudiced since she was in fact entitled to all of the proceeds.

The question is not whether a trial court has the power in the abstract to invoke equitable principles. The question is whether the trial court had the power to do what it did in this case.

In is our contention that, as a matter of law and regardless of what it chose to believe or disbelieve, the trial court was bound to find in this case that Genee Carreiro waived her claims as a beneficiary and was further bound to hold that, under the rule of *Beck v. West Coast Life Ins. Co.,* 38 Cal. 2d 643, 241 P. 2d 544, appellant, as alternative beneficiary of the policies, was entitled to the proceeds as against the estate of the assured.

It is significant to note that appellees do not deny that that case would be in point if this case were governed by California law. They merely contend that this case is not governed by California law.

As we will now demonstrate, however, this case *is* governed by California law.

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### (1) CALIFORNIA LAW IS APPLICABLE.

Appellees point out that the policies all provide that the death benefits should be paid at the com-

pany's home office in Boston, Massachusetts. They accordingly contend that the contracts were to be performed there, that California law is inapplicable and that the case of *Beck v. Downey,* 191 F. 2d 150 and 198 F. 2d 626, rather than that of *Beck v. West Coast Life Ins. Co.,* supra, is controlling.

That contention is untenable.

It is true that, in *Beck v. Downey,* supra, this court refused to apply the law of California. It pointed out that the policies were applied for in Iowa, issued in Indiana and delivered to the assured in Iowa. So far as the place of their performance was concerned, they provided that the death benefits would be paid in Indiana and that the premiums should be paid there. The first premium was in fact paid in Iowa and the assured died before the due date of the second premium.

In other words, no part of the contract was to be performed in California and the case had no connection whatever with that state except that the action was filed there.

Section 1646 of the Civil Code of California provides that "A contract is to be interpreted according to the law and usage of the place where it is to be performed". Under that section, there simply was no basis in that case for applying the law of California.

This, however, is a case in which the contracts were to be performed, in part at least, in California. We could even argue, but need not do so, that, in fact, they were completely performed in California since

the insurance company did not choose to pay the death benefits in Massachusetts but instead deposited them in court in California. In any event, however, the premiums (which, in an earlier case, this court described as "by far the greater number of performances", *Ostroff v. New York Life Ins. Co.,* 104 F. 2d 986, 988) were not only payable but in fact were paid in California[1] and the policies were serviced at the San Francisco office of the company (64-83).

A similar problem was presented in *Braun v. New York Life Ins. Co.,* 46 Cal. App. 2d 335, 115 P. 2d 880. The policy involved in that case was applied for and delivered to the assured in Pennsylvania.[2] Just as the policy in this case, it provided that the benefits were payable at the company's home office (in New York) and that the premiums could either be paid there or to an authorized agent of the company.

The court held that the policy was to be performed partly in New York and partly in any other place where the premiums were paid and other necessary business transacted. Since the assured had lived in California for at least 8 years before the filing of the action, the court rejected the contention of the insurance company that New York law was applicable (on

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[1]All of the policies are part of the record in this case (Exhibits G-6, G-7 and G-8). They all contain the standard provision (first paragraph of page 2) making premiums payable either at the home office of the company *or* to an agent of the company.

[2]In this case, policies Nos. 725936 and 725937 were applied for and presumably delivered in Honolulu. By 1942, when policy No. 1154064 was applied for, George Carreiro had moved to San Francisco. The application for that policy was signed there and the policy was presumably delivered to him there.

the theory that the policy was to be performed in New York) and held instead that it was to be performed in California and that California law was accordingly applicable.

The same result was reached in the earlier case of *Blair v. New York Life Ins. Co.*, 40 Cal. App. 2d 494, 104 P. 2d 1075 (hearing denied). The law of California was held to be applicable in that case to a policy issued by a New York company to a resident of the State of Washington, who, by the time the action arose, had become a resident of California and was paying the premiums there.

Thus, California *was* the place of performance of the policies in this case, the law of California *is* applicable and, appellees' contention to the contrary notwithstanding, *Beck v. West Coast Life Ins. Co.*, supra, *is* controlling.

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### (2) APPELLANT IS ENTITLED TO THE PROCEEDS OF THE POLICIES.

We agree with appellees that the sole issue before the trial court was that of George Carreiro's intention with respect to the disposition of the proceeds of the policies. We also agree that each case of this type is to be decided on its own facts. This does not mean, however, that anything goes.

The facts upon which we rely are written facts contained in a property settlement agreement. It is our contention that the agreement involved in this case was as broad and all inclusive as the agreements which have previously been held to amount to a

waiver of a beneficiary's claim under an insurance policy.

Hence, the issue can and must be decided as a matter of law[3] (particularly since no other creditable evidence was presented to the trial judge).

The allegedly inconsistent statements and actions of George Carreiro to which appellees refer in their brief (such as his failure to sign change of beneficiary forms or his failure to destroy his will) were all made or all taken *after* the execution of the property settlement agreement. Hence, the trial court's refusal to believe any of the evidence on the subject only means that it could not determine whether George Carreiro made further changes of beneficiaries *after the change resulting from the property settlement agreement.*

Appellees argue that, irrespective of the fact that a wife relinquished all her interest in and claims to insurance policies on the life of her husband, the husband has the right thereafter to make a gift of the proceeds to her. With this we again agree.

The point is, however, that, in this case, the trial court found the evidence to be inconclusive on the subject of whether George Carreiro made a gift of the proceeds back to Genee. Hence, the contention upon which appellees primarily rely (that George Carreiro made such a gift to her) is clearly untenable.

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[3]By declaring the question to be one of fact, the Supreme Court of California certainly did not intend to allow different trial courts to construe substantially similar property settlement agreements in different or opposite ways.

It might be well to note at this point the inconsistency in the position of appellees who argue at the same time that George Carreiro made a gift of the policies back to Genee (which means that she had previously waived her claims thereto) *and* that the agreement did not amount to a waiver by Genee of her rights to and claims under the policies. We assume that, at the time of the oral argument, appellees will tell this court which of the two contentions they actually rely upon.

Appellees cite four cases in support of the proposition that, notwithstanding a release in a property settlement agreement, the proceeds of life insurance policies are payable to the wife of the assured if he does not execute a change of beneficiary form. Those cases are all distinguishable.

In *Jenkins v. Jenkins,* 112 Cal. App. 402, 297 P. 56, the agreement listed all the property of the parties upon which it was to operate and specifically provided that, as to unlisted property, it should not be binding upon the wife. The policy involved in the action was not included in the list. Hence, the court had no difficulty in holding that the wife had not relinquished her claim as a beneficiary thereof.

In the course of its opinion, the court pointed out that, after their divorce, the husband had never exercised his power to change the beneficiary of the policy. This does not mean that a formal change of beneficiary is necessary in a case in which the divorced wife waived her claim as a beneficiary by a property settlement agreement. It only means that, in a case

in which there was no waiver, the husband must execute a formal change of beneficiary if he no longer wishes his former wife to receive the proceeds of the policies.

*Grimm v. Grimm,* 26 Cal. 2d 173, 157 P. 2d 841, is fully analyzed and explained in the excerpt from *Thorp v. Randazzo,* 41 Cal. 2d 770, 264 P. 2d 38, which is included in our opening brief. The agreement in that case, which was *not* as all inclusive as the agreement in this case, was held not to constitute an immediate release of the wife's claim as a beneficiary under the policies.

In *Miller v. Miller,* 94 Cal. App. 2d 785, 211 P. 2d 357, the court again held that the agreement was not broad enough to cover the claim of the wife as a beneficiary under certain insurance policies. The policies were mentioned neither in the agreement nor in the divorce action that followed the agreement. Nor did the agreement purport to cover all of the property of the parties. The following excerpt from the opinion makes it clear that, although the court held in that case that the wife had not waived her claim as a beneficiary, it would have held in this case that there had been a waiver:

> "The agreement here in question is somewhat unusual. . The preamble states that the parties desire to settle and adjust their property rights, interests and claims against each other. Thereafter, it is agreed that each conveys and releases to the other all his right and interest in and to certain specified items of property. It is not stated that this is all of their property, no men-

tion is made of these insurance policies or of any community property, it is not provided that the wife takes the property assigned to her in full satisfaction of all her rights and there is no provision that the property not mentioned shall belong to the husband. It is not specifically stated that these policies, in which each had a community interest, should become the separate property of the husband and there is no provision that no rights should accrue to the wife even though she remained the beneficiary at the time of the husband's death. The final paragraph consists of but one sentence, and provides that each party agrees that he will not claim from the other and that he thereby waives 'as though the marital relationship had never existed' certain rights against the other. These rights are specifically named and they are the right 'for support, alimony, court costs or attorney's fees in any action affecting the marital duties or relationship and any right to inherit from, to claim a probate homestead upon or to administer the estate of the other.' This language was not only general, but was used in the same sentence, and as a part of, this definite provision respecting these specified marital duties and rights only. Not only is that the only waiver but it is equally made by each of the parties. There is no waiver of any interest in any property which was not mentioned, each waives the same things, and the wife waives no more than does the husband. There is nothing to indicate that the rights of the parties in these insurance policies were not to remain just as they were, the husband having the right to certain benefits if he reached a certain age and the wife, as beneficiary, having the right to any

proceeds upon his death. In our opinion, it does not clearly appear from the language of this agreement that the parties intended it as covering and disposing of their respective interests in these policies, or that it was intended to deprive the wife of the right to take as beneficiary thereunder."

94 Cal. App. 2d 790-1.

It should also be noted that, in that case, the husband handed the policies to his wife after the execution of the agreement and told her that they belonged to her and that, two days later, when she offered to return them to him, he refused to take them stating again that they belonged to her.

In *Shaw v. Board of Administration,* 109 Cal. App. 2d 770, 241 P. 2d 635, no property settlement agreement was involved at all. In fact, none was executed by the parties. The case merely holds that, in an action for divorce in which the pleadings made no mention of a certain policy, a decree which does not mention it either has no effect upon the wife's rights as a beneficiary thereunder.

The cases which the trial court should have followed are the cases in which an all-inclusive property settlement agreement (such as the one involved in this case) was held to amount to a waiver of the wife's claim as a beneficiary. *Thorp v. Randazzo,* 41 Cal. 2d 770, 246 P. 2d 38, is one of them. *Sullivan v. Union Oil Co.,* 16 Cal. 2d 229, 105 P. 2d 922, is another and so is *Meherin v. Meherin,* 99 Cal. App. 2d 596, 222 P. 2d 305. The latter two cases are dis-

cussed at length in the excerpt from *Thorp v. Randazzo,* supra, which is quoted in the appendix to our opening brief. It would unnecessarily lengthen this brief for us to discuss them here.

Appellees argue that *Thorp v. Randazzo,* supra, "in no manner is authority for the proposition that the secondary beneficiary takes" (page 8 of their brief). In this, we concur. There was no secondary or alternative beneficiary in the *Thorp* case.

We did not cite that case in support of that proposition. We cited it in support of the proposition that the property settlement agreement amounted to a waiver of Genee's rights and that, as a result of that waiver, the policies became payable to whoever was next in line. In the *Thorp* case, the estate of the assured happened to be next in line. In this case, appellant is.

We fully realized that we would need further authority in support of the proposition that, as between the estate of the assured and the secondary beneficiary, the secondary beneficiary should be preferred. We found such authority in *Beck v. West Coast Life Ins. Co.,* supra.

Although appellees contend that we did, we did not cite that case "for the proposition that the purported disqualification of the primary beneficiary . . . is equivalent to death" (page 9 of their brief). That is not what the case decides.

It does hold, however, that, when a choice must be made between the alternative beneficiary and the es-

tate of the assured because the primary beneficiary is precluded from taking, the alternative beneficiary should be preferred since the assured has made it clear that any interest that his estate might have in the proceeds should be subordinate to the interest of the alternative beneficiary.

Appellees place strong reliance upon the dissenting opinion in that case. Unfortunately for them, however, it is the majority that counts.

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**CONCLUSION.**

Under the law of California, which is controlling, Genee Carreiro must be held to have waived her rights to the proceeds. As between George Carreiro's estate and his daughter, his daughter is entitled to preference. The judgment should accordingly be reversed with directions to the trial court to award the entire proceeds to appellant.

Dated, San Francisco, California,
March 21, 1956.

Respectfully submitted,
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*Attorney for Appellant.*